AHTNA, INC.

IBLA 86-1633 Decided February 23, 1989

Appeal from a decision of the Alaska State Office, Bureau of Land Management, determining, inter alia, that a parcel of land was not available for village selection under section 3(e) of the Alaska Native Claims Settlement Act, and approving other lands for interim conveyance, subject to a consent stipulation for mineral exploration, development or removal. AA-40790; F-14844-A.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Generally--Alaska Native Claims Settlement Act: Definitions: Federal Installation--Alaska Native Claims Settlement Act: Definitions: Public Lands--Public Lands: Alaska

   Pursuant to sec. 3(e) of the Alaska Native Claims Settlement Act, 43 U.S.C. | 1602(e) (1982), BLM may properly exclude from an interim conveyance land which was used seasonally in connection with the administration of a Federal installation during the period of time that the land was available for selection by a Native village corporation, regardless of the amount of use occurring after the appropriate selection period.

2. Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances--Alaska Native Claims Settlement Act: Conveyances: Village Conveyances

   Where a Native village corporation and a Native regional corporation have merged pursuant to 43 U.S.C. | 1627 (1982), BLM may properly include a consent stipulation, subjecting mining activity within the Native village to the consent of a separate entity composed of Native residents of the village, in an interim conveyance of land to the Native regional corporation as successor-in-interest to the village corporation.

APPEARANCES: Larry S. Lau, Resource Manager, Ahtna, Inc., Copper Center, Alaska, for appellant; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Alaska Region, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Ahtna, Inc., has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated September 22, 1986. This decision approved for interim conveyance certain public lands selected by Cantwell Yedatene Na Corporation to Ahtna, its successor-in-interest, 1/ subject to the retention of a BLM administrative site and to a stipulation that Ahtna must obtain the consent of the Native residents of Cantwell before engaging in exploration, development, or removal of minerals from lands within the boundaries of the Native village of Cantwell. 2/

On November 7, 1957, Public Land Order No. 1550 withdrew 12 acres of land in the vicinity of Slime Creek, described as U.S. Survey No. 4398 in sec. 24, T. 16 S., R. 7 W., Fairbanks Meridian, for use as a BLM administrative site. Buildings were constructed on the site in 1964 and 1965. From 1966 through 1978, BLM used the site as a storage area and a seasonal base for personnel involved in fire suppression and recreation in the Glenallen Resource Area. Since 1978, the site has been a support base for cadastral survey work out of Anchorage and for Glenallen field work.

On July 9, 1974, Cantwell Yedatene Na Corporation filed selection application F-14844-A, pursuant to section 12(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. | 1611(a) (1982), for the surface estate in lands in the Cantwell area including the section containing the BLM administrative site, U.S. Survey No. 4398. On December 5, 1974, the village corporation specifically amended its selection to include certain listed U.S. Survey sites, including 4398. In 1980, the site was identified as a Federal installation and serialized as ANCSA section 3(e) application AA-40790, pending a determination whether the site was public land subject to conveyance to Native corporations.

In the decision on appeal here, BLM described 3.2 acres of land within U.S. Survey No. 4398, which it determined was the smallest practicable tract actually used in connection with the administrative site. BLM approved the remaining approximately 8.8 acres for conveyance to Ahtna, subject to various reservations and stipulations, including the consent stipulation in dispute here.

1/ Cantwell Yedatene Na Corporation and various other Native village corporations merged into Ahtna, Inc., on Sept. 30, 1980.

2/ Thus, the BLM decision noted that:

"Pursuant to Secs. 14(f) and 30(e) of ANCSA, 43 U.S.C. 1601, 1613(f), 1627(e), and Departmental regulation 43 CFR 2652.4, conveyance of the subsurface estate shall be issued to AHTNA, Incorporated when the surface estate is conveyed and shall be subject to the same conditions as the surface conveyance, except for those provisions under Sec. 14(c) of ANCSA; also the right to explore, develop or remove minerals from the subsurface estate in lands within the boundaries of the Native village of Cantwell shall be subject to the consent of an entity composed of Native residents of Cantwell."

Appellant filed this appeal objecting to the consent stipulation and to retention of the 3.2-acre administrative site. Appellant argues with respect to the administrative site that, since BLM did not use the site continuously during the requisite period, the parcel is available for conveyance to Ahtna. With respect to the consent stipulation, Ahtna argues that BLM does not have the right to impose it because Ahtna has merged with the Cantwell village corporation, and the merger agreement, itself, spells out terms controlling exploration, development, and removal of minerals from the subsurface estate. Ahtna contends that BLM scrutiny of such internal corporate matters is improper. Alternatively, Ahtna asks BLM to provide it "with a large-scale map that would identify the 'boundaries of the Native village of Cantwell' within which these stipulations would apply" (Statement of Reasons (SOR) at 2).

In reference to the 3.2-acre part of U.S. Survey No. 4398 which was excluded from the approved interim conveyance, BLM argues that this acreage constituted the smallest practicable tract needed for Federal retention, noting that continuous use was documented through 1978, well after the 1974 deadline. And, with regard to the consent stipulation, BLM asserts that 43 U.S.C. || 1613(f) and 1627(e) (1982) and 43 CFR 1652.4 required its inclusion in the interim conveyance decision. BLM amended its response specifically to decline to take a position on the issue of the exact location of boundaries of the Native village of Cantwell for consent purposes, considering the boundaries an internal matter for the regional corporation and the village to decide.

[1] Ahtna first objects to the retention of the BLM administrative site. Section 11(a)(1) of ANCSA, 43 U.S.C. | 1610(a)(1) (1982), withdrew "public lands" from appropriation under the public land laws, subject to valid existing rights, and made them available for selection by Native corporations. Of relevance herein, however, section 3(e) of ANCSA defined the term "public lands" to exclude the "smallest practicable tract * * * enclosing land actually used in connection with the administration of any Federal installation." 43 U.S.C. | 1602(e) (1982). The applicable Departmental regulation, 43 CFR 2655.2, reiterated this limitation: "Land[s] subject to determination under section 3(e)(1) of the Act will be subject to conveyance to Native corporations if they are determined to be public lands * * *. If the lands are determined not to be public lands, they will be retained by the holding agency."

Under the regulations, among the determinations BLM must make is whether the land was used "for a purpose directly and necessarily connected with the Federal agency as of December 18, 1971" and whether the "use was continuous, taking into account the type of use throughout the appropriate selection period." 43 CFR 2655.2(a)(1) and (2). The appropriate selection period is defined as "the statutory or regulatory period within which the lands were available for Native selection under [ANCSA]." 43 CFR 2655.0-5(b). The selection period for village selections ended on

December 18, 1974, "three years from December 18, 1971." 43 U.S.C. | 1611(a)(1) (1982); Unalakleet Native Corp., 93 IBLA 190, 192 (1986).

The basic thrust of appellant's complaint is that BLM's use of the land was not "continuous," but rather was "sporadic, seasonal, and subject to the occurrence of wildfires in the area and survey crew activity" (SOR at 1). BLM responds that appellant has misapprehended the thrust of the requirement that the use be continuous. Thus, BLM notes that the applicable regulation, 43 CFR 2566.2(a)(2), expressly requires that, in adjudicating whether a use was continuous, this be determined "taking into account the type of use" occurring. BLM asserts that where, as in the instant case, the type of use is itself seasonal, continuous seasonal use fulfills the regulatory standard. We agree.

As noted above, the regulation expressly requires consideration of the type of use occurring. In this regard, the requirement of continuous use is analogous to that involved in Native allotment applications. Thus, while the applicable regulation requires a showing of 5 years' substantially continuous use and occupancy (43 CFR 2561.2(a)), the regulations further expressly advise that the substantially continuous use and occupancy standard "contemplates the customary seasonality of use and occupancy by the applicant." 43 CFR 2561.0-5(a). Pursuant to this standard, the Department has consistently recognized that substantial use limited to specific seasons meets the regulatory requirement that the use be "substantially continuous." See Amelia K. Blastervold, 23 IBLA 207 (1976); John Nanalook, 17 IBLA 353 (1974). We believe that the same result must obtain under the regulations relating to section 3(e) determinations.

BLM has documented its use through and beyond the close of the selection period in 1974. BLM has shown annual seasonal use, which was "continuous, taking into account the type of use," during the selection period. 43 CFR 2655.2(a)(2). Even if BLM curtailed its use of the site after the selection period, the site is still properly excluded from selection by the Native corporation. See, e.g., Nunakauiak Yupik Corp., 87 IBLA 313, 315 (1985); Ukpeagvik Inupiat Corp., 81 IBLA 222, 227 (1984).

[2] Insofar as appellant's objection to the consent stipulation is concerned, we note that, as originally adopted, ANCSA required the consent of the separate village corporations to mining activity planned by a regional corporation in the subsurface estate in lands within the village boundaries. 43 U.S.C. | 1613(f) (1982); 43 CFR 2652.4. However, pursuant to a 1976 amendment to ANCSA, 43 U.S.C. | 1627 (1982), Ahtna and Cantwell Yedatene Na Corporation merged in 1980. While authorizing such mergers, the 1976 amendment preserved the requirement of village consent to mineral activity within its borders as follows:

> The plan of merger or consolidation shall provide that the right of any affected Village Corporation pursuant to section 1613(f) of this title to withhold consent to mineral exploration, development, or removal within the boundaries of the Native village shall be conveyed, as part of the merger or consolidation, to

> a separate entity comprised of the Native residents of such Native village. [Emphasis added.]

43 U.S.C. | 1627(e) (1982).

The purpose and scope of this provision is addressed in the legislative history of the amendment. Thus, Congress noted:

> Section 14(f) of the Settlement Act [43 U.S.C. | 1613(f) (1982)] provides that the right to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any Native village are to be subject to the consent of the Village Corporation. This provision provides protection to villages from a precipitate decision by Regional Corporations to develop the subsurface estate. This provision seeks to avoid potential conflicts between villages which are holders of the surface estate and which may be made concerned with preserving the use of the land in accordance with traditional local life-styles and subsistence economy and Regional Corporations which are holders of the subsurface estate and which may have as their focus the generation of revenues from the land. Without specific provisions to the contrary, once a Village Corporation merges or consolidates with other corporations under this new section 30, it would lose this authority over its immediate land base. Therefore to preserve this authority, subsection (e) has been included. Subsection (e) requires that any plan of merger or consolidation must provide that the 14(f) right of any affected Village Corporation is to be conveyed, as part of the merger or consolidation, to a separate entity composed of the Native residents of that village.

H.R. Rep. No. 729, 94th Cong., 1st Sess. 26-27 (1975), reprinted in 1975 U.S. Code Cong. & Admin. News 2376, 2393.

The case record does not contain a copy of the merger agreement showing that this statutorily required right of consent was assured; nor did Ahtna submit one on appeal. Particularly in the absence of such assurance, BLM properly inserted the consent stipulation in the conveyance document, pursuant to 43 U.S.C. | 1627(e) (1982). See 43 CFR 2652.4. Appellant has not shown that the consent condition is not in accordance with the applicable statutes, regulations, or the proper administration of the public lands, and the inclusion of such a provision in the interim conveyance must be sustained. Ahtna, Inc., 105 IBLA 380, 383 (1988).

Ahtna also requests that BLM be required to identify the boundaries of the lands subject to the consent stipulation. The stipulation applies to "the subsurface estate in lands within the boundaries of the Native village of Cantwell" (Interim Conveyance at 5). Beyond that, however, BLM considers the delineation of the boundaries an internal matter "between the appropriate village entity and the regional corporation" (Answer at 3). In view of the difficulties which could arise should BLM attempt to delineate the boundaries of the Native village, we agree with BLM that this is a question properly left to the appropriate Native entity and the regional corporation.

Ahtna's request for further identification of the village boundaries is properly denied. 3/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

James L. Burski
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

3/ In this regard, we note that while section 14(f) of ANCSA similarly prohibits the exploration, development, or removal of minerals from lands "within the boundaries of any Native village," no mechanism is provided therein for establishing where those boundaries may be. See 43 U.S.C. | 1613(f) (1982). To that extent, therefore, Ahtna is no worse off than other regional corporations which have not merged with the individual village corporations within their regions.